STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE PROBATE COURT FOR THE COUNTY OF SAGINAW
THE HONORABLE PATRICK J. McGRAW, PROBATE JUDGE, PRESIDING

In Re VanConett Estate

FLOYD RAU, Personal Representative of the Estate of HERBERT L. VanCONETT, Deceased; JOYCE ANN FLORIP; KAREN JEAN PETERSON; and SANDRA LEE PARACHOS,

Plaintiffs- Appellants,
vs.

ELIZABETH M. LEIDLEIN,
Defendant-Appellee.

-and-

~~vs.~~

MARIANNE DURUSSEL,

Defendant-Appellee.

Supreme Court
File No.

Court of Appeals
File No. 247516 Opn 7/6/04

Saginaw County
Probate Court
File No. 01-111943-DE-CZ
P. McGraw

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FLOYD RAU, Personal Representative of the Estate of HERBERT L. VanCONETT, Deceased; JOYCE ANN FLORIP; KAREN JEAN PETERSON; and SANDRA LEE PARACHOS,	Supreme Court File No.
Plaintiffs- Appellants, vs.	Court of Appeals File No. 247516
ELIZABETH M. LEIDLEIN, Defendant-Appellee.	Saginaw County Probate Court File No. 01-111943-DE-CZ
-and-	
vs.	
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APPLICATION FOR LEAVE TO APPEAL

Now come the above entitled Plaintiffs-Appellants, FLOYD RAU, Personal Representative of the Estate of HERBERT L. VanCONETT, Deceased; JOYCE ANN FLORIP; KAREN JEAN PETERSON; and SANDRA LEE PARACHOS, by and through their Attorney, WALTER

MARTIN, JR., and pursuant to MCR 7.302(A), state as follows:

1. Appellants appeal the Michigan Court of Appeals Opinion, dated July 1, 2004, which affirmed in part, reversed in part and remanded to the Saginaw County Probate Court, the Trial Court's Order Granting Summary Disposition in favor of Defendants and Denial of Plaintiffs' Motions for Summary Disposition. (Attachment A)

2. This case involves the right of the decedent, HERBERT L. VanCONETT, to dispose of property following the death of his wife, ILA R. VanCONETT, under a mutual Will made pursuant to a contract to make a Will.

3. On 3-6-1989, HERBERT L. VanCONETT and ILA R. VanCONETT, husband and wife, executed separate but mutual Wills. A copy of HERBERT L. VanCONETT's Will is Attachment H and ILA R. VanCONETT's Will is Attachment I.

4. Each Will contained a reciprocal contract provision. Specifically, the Will of HERBERT L. VanCONETT contained the following provision:

> "I hereby expressly acknowledge that this Will is made pursuant to a contract or agreement entered into between my wife, ILA R. VanCONETT, and myself for the purpose of disposing of all our property, whether owned by us as joint tenants, as tenants in common or in severalty, in the manner hereinabove in this, my Last Will and Testament, provided, and I expressly declare that in the event my wife, ILA R. VanCONETT, shall predecease me, then and in that event, this my Last Will and Testament shall be irrevocable."

Similarly the Will of ILA R. VanCONETT contained the following provision:

> "I hereby expressly acknowledge that this Will is made pursuant to a contract or agreement entered into between my husband, HERBERT L. VanCONETT, and myself for the purpose of disposing of all our property, whether owned by us as joint tenants, as tenants in common or in severalty, in the manner hereinabove in this, my Last Will and Testament, provided, and I expressly declare that in the event my husband, HERBERT L. VanCONETT, shall predecease me, then and in that event, this my Last Will and Testament shall be irrevocable."

5. Paragraphs 2 and 3 of each spouse's Will left all of his/her property first to the surviving spouse and, if that spouse were deceased, then to designated beneficiaries.

6. Plaintiffs, JOYCE ANN FLORIP, KAREN JEAN PETERSON and SANDRA LEE PARACHOS, are the designated beneficiaries under the Will of decedent, HERBERT L. VanCONETT. Plaintiff, FLOYD RAU, was the designated Personal Representative of both parties' Wills.

7. At the time of executing their Wills, the VanCONETT's were the owners of a home and real property they had acquired in June, 1956, taking title as, *"Herbert L. VanConett, Ila R. VanConett, and Florence H. VanConett, as joint tenants with full right of survivorship and not as tenants in common"*. (Attachment J) The joint tenant, Florence H. VanConett, died April 16, 1967. (Attachment K)

8. Ila R. VanConett died July 18, 1993. (Attachment L)

9. On May 31, 1996, HERBERT L. VanCONETT executed a Quit-Claim Deed conveying the fee title of the parties' marital home and real property to his neighbor, Defendant, MARIANNE DURUSSEL, for $1.00 and reserved unto himself a life estate. (Attachment M)

10. Plaintiffs filed suit against Defendant DURUSSEL seeking an Order to cancel and set aside the May 31, 1996 Quit-Claim Deed and also specific performance of the contract between decedent, HERBERT L. VanCONETT, and his wife, ILA R. VanCONETT, pursuant to which their separate but mutual Wills were executed. (Attachment N)

11. Plaintiffs filed a separate civil action against Defendant LEIDLEIN seeking to recover monies and other personal property decedent had gifted, given to and/or made joint with Defendant, ELIZABETH LEIDLEIN, after the death of his wife. (Attachment O)

12. Plaintiff, FLOYD RAU, commenced his suit in his capacity as Personal Representative of decedent's Estate to recover the real estate in question as an asset of decedent's Estate. Plaintiffs, JOYCE ANN FLORIP, KAREN JEAN PETERSON and SANDRA LEE PARACHOS, brought their action as the beneficiaries under the above mentioned contract between decedent and his wife.

13. Plaintiffs and Defendant DURUSSEL each filed Motions for Summary Disposition. The Trial Court denied Plaintiffs' Motion for Summary Disposition and granted Defendant DURUSSEL's Motion for Summary Disposition. (Attachment E, Page 5)

14. The Court also granted summary disposition for Defendant LEIDLEIN without the benefit of a Motion being filed under its authority pursuant to MCR 2.116(I). (Attachment F)

15. Plaintiffs filed a Motion for Reconsideration which was denied by Order Denying Motion for Reconsideration, dated March 6, 2003. (Attachment G)

16. Appellants filed a Claim of Appeal as of right to the Michigan Court of Appeals on March 26, 2003.

17. The Court of Appeals initially issued an Opinion for publication, dated May 11, 2004. (Attachment C)

18. Appellants filed a Motion for Reconsideration of that May 11, 2004 Opinion; said Motion was denied by an Order, dated June 28, 2004. (Attachment D)

19. On the Court of Appeals' own Motion, the May 11, 2004 Opinion was vacated and a new amended Opinion for publication was rendered July 1, 2004. (Attachment A)

20. The Trial Court determined that the Will of decedent, HERBERT L. VanCONETT, was revocable (Attachment E, Pages 4 and 5). This holding was affirmed by the Court of Appeals. (Attachment A, Pages 1 and 3).

21. Plaintiffs assert that the decision of the Court of Appeals referenced in Paragraph 20 above is clearly erroneous and will cause material injustice, all as more fully set forth in Issue I in the attached Brief in Support of this Application for Leave to Appeal.

22. Plaintiffs asserted that decedent breached the Will contract with his wife by his act of quit-claiming the title to the marital home to Defendant DURUSSEL and reserving unto himself a life estate. Plaintiffs further asserted that decedent breached the parties' Will contract by his gifting, giving to and/or making joint with Defendant LEIDLEIN monies and other personal property which rightfully belong to the Estate and/or the Will contract beneficiaries.

23. The Trial Court found, and the Court of Appeals affirmed, decedent's right to dispose of the realty in the manner done. (Attachment E, Pages 4-5; Attachment A, Pages 1, 4-5)

24. That the issues involved in the Court's decision referenced in Paragraphs 22 and 23 above involve legal principles

of major significance to the jurisprudence of Michigan:

(a) Counsel is unaware of any Michigan case law that has addressed this specific factual scenario, i.e. in the context of separate mutual Wills made pursuant to a contract, what limitation, if any, is placed on the power of a surviving spouse during his/her lifetime over property which is subject to the parties' Will contract when the Will contract is silent on that issue. Specifically, may the surviving spouse without violating the Will contract:

(1) gift or give away said property?

(2) dispose of said property by deed operating as a testamentary disposition?

(3) place said property in non-probated assets with persons other than the Will contract beneficiaries?

(b) While this is an issue of first impression in Michigan, courts from other states have ruled on this issue and have consistently held it to be a breach of the parties' Will contract. ***Fitch v. Oesch, 30 Ohio Misc 15; 281 NE2d 206 (1971); Wagner v. Wagner, 58 App Div 2d 7; 395 NYS2d 641 (1977); Ashley v. Volz, 218 Tenn 420; 404 SW2d 239 (1966); Daniels v. Aharonian, 63 RI 282; 7 A2d 767; In Re Estate of Bell, 6 Ill App 3d 802; 286 NE2d 589 (1972); In Re Estate of Tompkins, 195 Kan 467; 407 P2d 545 (1965); In Re Estate of Chayka, 47 Wis***

2d 102; 176 NW2d 561 (1970). See Issue II of the attached Brief in Support of this Application for Leave to Appeal.

25. The Court of Appeals decided that the real property in question was not covered by the couple's Will contract and instead automatically passed to HERBERT, as the surviving spouse, outside of his wife's Will by virtue of his survivorship rights of their joint tenancy. (Attachment A, Pages 4-5)

26. The decision of the Court of Appeals as to the issues referenced in Paragraph 25 above:

(a) is contrary to the express intent of the parties as expressed in their respective Wills, is clearly erroneous and will cause material injustice;

(b) is in conflict with previous decisions of the Michigan Supreme Court; and

(c) the subject matter of this appeal issue involves legal principles of major significance to the jurisprudence of Michigan;

(1) The Court of Appeals' decision makes null and void and of no value mutual Wills as they apply to real property a husband and wife hold jointly with right of survivorship;

(2) As a practical matter, and in most cases, the assets of husband and wife are held jointly. Therefore, in effect, this decision renders mutual Wills worthless. See Issue III

of the attached Brief in Support of this Application for Leave to Appeal.

27. Separate mutual Wills and/or joint mutual Wills have long been recognized in Michigan as a method used by a husband and wife to dispose of their property. Typically, a mutual Will is implemented by a husband and wife in second marriages and/or by a couple who have been married in excess of 20 years. In light of the ever increasing number of second marriages, as well as the increasing number of first marriages exceeding 20 years, attorneys are being called upon to prepare more mutual Wills to meet their clients' needs. As attorneys, we need to know what we can and cannot do in the context of mutual Wills.

28. The grounds on which Appellants' application is based and legal authorities supporting the arguments advanced are elaborated and set forth in detail in the accompanying Brief in Support of Appellants' Application for Leave to Appeal.

WHEREFORE, Plaintiffs-Appellants respectfully request this Court:

A. Grant their Application for Leave to Appeal.

B. Set aside the Probate Court's Order, dated February 25, 2003, granting summary disposition in favor of Defendant, MARIANNE DURUSSEL, and direct entry of an Order granting Plaintiffs' Summary Disposition on their Complaint against Defendant, MARIANNE DURUSSEL.

C. Set aside the Probate Court's Order, dated March

24, 2003, granting summary disposition in favor of Defendant, ELIZABETH LEIDLEIN.

I declare that the statement above are true to the best of my information, knowledge and belief.

Dated this 6th day of August, A.D., 2004.

Respectfully Submitted,

Walter Martin Jr

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STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE PROBATE COURT FOR THE COUNTY OF SAGINAW
THE HONORABLE PATRICK J. McGRAW, PROBATE JUDGE, PRESIDING

FLOYD RAU, Personal Representative of the Estate of HERBERT L. VanCONETT, Deceased; JOYCE ANN FLORIP; KAREN JEAN PETERSON; and SANDRA LEE PARACHOS,	Supreme Court File No.
Plaintiffs- Appellants, vs.	Court of Appeals File No. 247516
ELIZABETH M. LEIDLEIN, Defendant-Appellee.	Saginaw County Probate Court File No. 01-111943-DE-CZ
-and-	
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BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF JURISDICTION

This Court has jurisdiction of Plaintiffs' Application for Leave to Appeal pursuant to MCR 7.302(A).

STANDARD OF REVIEW

The following standard of review applies to all issues raised on appeal. The Trial Court's decision to grant or deny summary disposition is reviewed de novo for clear error on appeal. ***Spiek v. Dep't of Transportation, 456 Mich 331, 337; 572 NW2d 201 (1998)*** The standard of review in cases where a Probate Court sits without a Jury is whether the Court's findings are clearly erroneous. ***In re Bennett Estate, 255 Mich App 545, 549; 662 NW2d 772 (2003).*** "A finding is clearly erroneous when a reviewing court is left with a definite and firm conviction that a mistake has been made, even if there is evidence to support the finding." ***In re Bennett Estate, supra***, at 549 It also reviews de novo its conclusions of law. ***Chapdelaine v. Sochocki, 247 Mich App 167, 169; 635 NW2d 339 (2001)***

STATEMENT OF ISSUES PRESENTED

ISSUE I.

DID THE TRIAL COURT ERR IN FINDING DECEDENT'S WILL WAS REVOCABLE?

Appellants assert the answer is, "Yes."

Appellees assert the answer is, "No."

The Court of Appeals assert the answer is, "No."

ISSUE II.

WHEN A HUSBAND AND WIFE EXECUTE SEPARATE BUT MUTUAL WILLS LEAVING PROPERTY FIRST TO THE SURVIVING SPOUSE AND UPON DEATH OF THE SURVIVOR, THE REMAINDER TO DESIGNATED BENEFICIARIES WITHOUT DEFINING THE SURVIVOR'S POWER OVER THE PROPERTY OR RESTRICTING THE DISPOSITION OF PROPERTY DURING THE LIFETIME OF THE SURVIVING SPOUSE, MAY THE SURVIVING SPOUSE DISPOSE OF THE PROPERTY BY GIFTING OR GIVING IT AWAY OR DISPOSING OF IT BY DEED OPERATING AS A TESTAMENTARY DISPOSITION AND/OR PLACING THE SAME IN NON-PROBATED ASSETS WITH PERSON OTHER THAN THE WILL CONTRACT BENEFICIARIES?

Appellants assert the answer is, "No."

Appellees assert the answer is, "Yes."

The Court of Appeals assert the answer is, "Yes."

ISSUE III.

DID THE COURT OF APPEALS ERR IN HOLDING THAT THE REAL PROPERTY IN QUESTION WAS NOT COVERED BY THE COUPLE'S WILL CONTRACT AND INSTEAD AUTOMATICALLY PASS TO THE HUSBAND OUTSIDE OF HIS WIFE'S WILL BY VIRTUE OF HIS SURVIVORSHIP RIGHTS OF THEIR JOINT TENANCY?

Appellants assert the answer is, "Yes."

Appellees assert the answer is, "No."

The Court of Appeals assert the answer is, "No."

STATEMENT OF FACTS

Plaintiffs appeal as of right the Probate Court's Orders granting summary disposition in favor of Defendants. This case involves the right of the decedent, HERBERT L. VanCONETT, to dispose of property following the death of his wife, ILA R. VanCONETT, under a separate but mutual Wills made pursuant to a contract to make a Will.

On 5-3-02, Plaintiffs filed a civil action against Defendant, MARIANNE DURUSSEL, seeking an Order to cancel and set aside a 5-31-96 Quit-Claim Deed and also specific performance of a contract between decedent, HERBERT L. VanCONETT, and his wife, ILA R. VanCONETT, pursuant to which their separate but mutual Wills were executed. (Attachment N)

On 5-3-02, Plaintiffs filed a separate civil action against Defendant, ELIZABETH M. LEIDLEIN, seeking to recover monies and other personal property decedent had given to, gifted and/or made joint with Defendant, ELIZABETH M. LEIDLEIN. Plaintiffs also alleged that Defendant LEIDLEIN had converted other assets which rightfully belonged to Plaintiff Estate and/or Plaintiff contract beneficiaries. Plaintiffs further sought an accounting of all the personal property and monies of decedent that Defendant LEIDLEIN controlled in her capacity as Power of Attorney for decedent and in handling decedent financial affairs. (Attachment O)

Plaintiff, FLOYD RAU, commenced both suits against Defendants in his capacity as Personal Representative of the

Estate of HERBERT L. VanCONETT, Deceased. Plaintiffs, JOYCE ANN FLORIP, KAREN JEAN PETERSON, and SANDRA LEE PARACHOS, brought their action against Defendants as the beneficiaries under the above mentioned contract.

The Court consolidated the above two actions.

The following facts are undisputed:

(a) That HERBERT L. VanCONETT and ILA R. VanCONETT were husband and wife and purchased the subject property in question by Warranty Deed, dated June 1, 1956, taking title as follows:

"HERBERT L. VanCONETT, ILA R. VanCONETT and FLORENCE H. VanCONETT, as joint tenants with full right of survivorship and not as tenants in common"
(Attachment J)

(b) That FLORENCE H. VanCONETT died April 16, 1967.
(Attachment K)

(c) That on March 6, 1989, HERBERT L. VanCONETT, and his wife, ILA R. VanCONETT, executed separate Wills, each drafted by F. H. MARTIN and each witnessed and typed by his secretary, LUCY T. BELILL. A copy of the Will of HERBERT L. VanCONETT is Attachment H and a copy of the Will of ILA R. VanCONETT is Attachment I.

(d) That both of these Wills were placed on file with the Saginaw County Probate Court for safekeeping.
(Attachment P, Paragraph 4)

(e) That the Will of HERBERT L. VanCONETT contains the following provision:

"I hereby expressly acknowledge that this Will is made pursuant to a contract or agreement entered into between my wife, ILA R. VanCONETT, and myself for the purpose of disposing of all our property, whether owned by us as joint tenants, as tenants in common or in severalty, in the manner hereinabove in this, my Last Will and Testament, provided, and I expressly declare that in the event my wife, ILA R. VanCONETT, shall predecease me, then and in that event, this my Last Will and Testament shall be irrevocable." (Attachment H)

(f) That the attestation clause of HERBERT L. VanCONETT's Will specifically indicates:

"We hereby attest that the foregoing instrument was on the date hereto, in our presence, signed, sealed and declared by HERBERT L. VanCONETT, the above named Testator, to be his Last Will and Testament, **made pursuant to a contract or agreement between himself and his wife**, ILA R. VanCONETT, **as therein provided**, . . ." (Emphasis Added) (Attachment H)

(g) That the Will of ILA R. VanCONETT contains the following provision:

"I hereby expressly acknowledge that this Will is made pursuant to a contract or agreement entered into between my husband, HERBERT L. VanCONETT, and myself for the purpose of disposing of all our property, whether owned by us as joint tenants, as tenants in common or in severalty, in the manner hereinabove in this, my Last Will and Testament, provided, and I expressly declare that in the event my husband, HERBERT L. VanCONETT, shall predecease me, then and in that event, this my Last Will and Testament shall be irrevocable." (Attachment I)

(h) That the attestation clause of ILA R. VanCONETT's Will specifically indicates:

"We hereby attest that the foregoing instrument was on the date hereto, in our presence, signed, sealed and declared by ILA R. VanCONETT, the above named Testatrix, to be her Last Will and Testament, **made pursuant to a contract or agreement between herself and her husband**, HEBERT L. VanCONETT, **as therein provided**, . . ." (Emphasis Added) (Attachment I)

(i) That at the time of execution of said Wills, both testators were advised that their respective Wills were being executed pursuant to a contract between them as husband and wife in which they each were leaving their

property first to each other and then in the event their spouse predeceased him or her, then to specific individuals named in their respective Wills. They were further advised that either of them had the right to revoke their respective Wills during their lifetime, but upon their death, their Will would become irrevocable. (Attachment P, Paragraph 3)

(j) That the scrivener of the Wills, F. H. Martin, died 12-28-96. That an Affidavit of Fred Martin, Jr., who practiced law with F. H. Martin was submitted wherein he indicated:

"That it was the standard practice of our firm to explain the effect and ramifications of the above mentioned provision in their separate wills as follows:

(a) That the will of each of them was being made pursuant to a contract or an agreement between them as husband and wife to devise all of their property in the manner and to the beneficiaries as designated in their respective will.

(b) That during their lifetime, each had the right to amend, revise or revoke the provisions of their separate wills. However, if neither did so, upon the death of one them, the will of the surviving spouse would become irrevocable for the reason that their wills had been made pursuant to a contract between them.

(c) That whatever property the surviving spouse still possessed at the time of his or her death would then be disposed of according to the terms of the will that of surviving spouse.

(d) That "**all our property**" meant just that - all of their property, no matter how owned, i.e. separately or jointly.

(e) That during the lifetime of the surviving spouse, he or she could do with that property as he or she saw fit but the surviving spouse could not give away, gift or dispose of that property in a manner which would be inconsistent and thwart the intent of the parties as evidenced in their separate mutual wills.

(f) Further, that if they did so, then the designated beneficiaries under that will would have a cause of action to enforce the terms of the contract because the surviving spouse breached the contract pursuant to which that will was made." (Attachment Q, Paragraphs 2 and 9)

(k) That ILA R. VanCONETT died July 18, 1993.(Attachment L)

(l) That as of the date of ILA R. VanCONETT's death, July 18, 1993, neither HERBERT L. VanCONETT nor ILA R. VanCONETT had withdrawn from safekeeping with the Saginaw County Probate Court their original Last Will and Testaments, deposited on March 8, 1989. [Attachment R, Paragraph 2(d)]

(l) That on May 31, 1996, HERBERT L. VanCONETT executed a Quit-Claim Deed conveying the fee title of the parties' marital home and real property to his neighbor, Defendant, MARIANNE DURUSSEL, and reserved unto himself a life estate. That said Quit-Claim Deed was prepared by F. H. MARTIN and typed and witnessed by his secretary, LUCY T. BELILL. (Attachment M)

(m) That on November 8, 1996 and November 18, 1996, being 3 years and 4 months after the death of ILA R. VanCONETT, HERBERT L. VanCONETT came into the office of F. H. MARTIN and wanted to change his Will. He was advised by F. H. MARTIN that he could not change his Will as said Will was made pursuant to a contract with his wife, which became irrevocable upon her death. (Attachment P, Paragraph 6)

(n) That on November 19, 1996, HERBERT L. VanCONETT

withdrew from safekeeping with the Saginaw County Probate Court his Last Will and Testament, placed on deposit March 8, 1989. [Attachment R, Paragraph 2(e)]

(o) That HERBERT L. VanCONETT died 10-26-01. [Attachment R, Paragraph 2(f)]

(p) That on 12-11-01, an authenticated photocopy of decedent's Last Will and Testament, dated 3-6-89, was admitted to probate in the Probate Court of Saginaw County, Michigan, being File No. 01-111943-DE. [Attachment R, Paragraph 2(g)]

(q) That Plaintiff, FLOYD RAU, was appointed Personal Representative of decedent's Estate by Order of this Court, dated 12-11-01, and Letters of Authority were issued him 12-11-01. [Attachment R, Paragraph 2(h)]

Plaintiffs filed a Motion for Summary Disposition Pursuant to MCR 2.116(C)(9) and (10) as to Defendant, MARIANNE DURUSSEL. (Attachment E, Page 2)

Defendant, MARIANNE DURUSSEL, filed a Motion for Summary Disposition Pursuant to MCR 2.116(C)(8) and (10) against the Plaintiffs. (Attachment E, Page 2)

On 2-12-03, both Motions came on for hearing. At that hearing, Appellants argued that the 5-31-96 Quit-Claim Deed transferring title to Defendant DuRUSSEL was prepared in error. F. H. Martin's secretary, Lucy T. Belill, would testify that had she or F. H. Martin recalled decedent had executed a mutual Will with his wife seven years earlier, said Quit-Claim Deed would not

have been prepared since it violated their mutual Wills. (MT-20,21)

The Court by *Opinion and Order*, dated 2-25-03, denied Plaintiffs' Motion for Summary Disposition and granted summary disposition pursuant to MCR 2.116(C)(8) and (10) in favor of Defendant, MARIANNE DURUSSEL. (Attachment E, Page 5)

As to the claim of FLOYD RAU as Personal Representative of the Estate of HERBERT L. VanCONETT, Deceased, the Court in the above mentioned *Opinion and Order* found, among other things:

(a) That HERBERT L. VanCONETT's Will was revocable. The Court based this finding on the fact that the lawyer who drafted the Wills and the secretary who typed the Wills, although both indicating that the Wills were irrevocable subsequently showed that intent was not present when they prepared, signed and notarized the subsequent deed involving the property after the death of ILA R. VanCONETT. (Attachment E, Page 4)

(b) That decedent, HERBERT L. VanCONETT, had destroyed his Will by removing it from the Saginaw County Probate Court on 11-19-96 - being after the death of his wife. (Attachment E, Page 5)

(c) That the real property in question was held by HERBERT L. VanCONETT and ILA R. VanCONETT as "tenants by the entirety". (Attachment E, Pages 4-5)

(d) That the Estate lacked standing to bring the suit as the real property passed outside of probate by virtue

of the tenancy created. (Attachment E, Page 5)

As to the suit filed by Plaintiffs, JOYCE ANN FLORIP, KAREN JEAN PETERSON and SANDRA LEE PARACHOS, as contract beneficiaries, the Court found:

(a) That said Plaintiffs failed to establish a contract as alleged. (Attachment E, Page 5)

(b) The lack of extrinsic evidence that would support such a contract. (Attachment E, Page 5)

The Court further found that none of the Plaintiffs had established that the statutory requirements of MCL 700.2514 were met as it pertains to a contract to make a Will. (Attachment E, Page 5)

Plaintiffs and Defendant, ELIZABETH M. LEIDLEIN, stipulated that the facts in Plaintiffs' Complaint against Defendant DuRUSSEL were also facts applicable to Plaintiffs' Complaint against Defendant LEIDLEIN. Based upon that stipulation, the Probate Court, using its authority under MCR 2.116(I), by an *Opinion and Order*, dated March 24, 2003, granted summary disposition in favor of Defendant LEIDLEIN pursuant to MCR 2.116(C)(8) and (10). In so ruling, the Court stated in its Opinion:

> "This conclusion is based upon the findings of fact and conclusions of law set forth in this Court's Opinion and Order, dated February 25, 2003, and Order Denying Motion for Reconsideration, dated March 6, 2003, rendered in Plaintiffs' action against Defendant, MARIANNE DURUSSEL, and the same is incorporated herein by reference." (Attachment F)

Plaintiffs filed a Motion for Reconsideration which was denied by *Order Denying Motion for Reconsideration*, dated March 6, 2003.

(Attachment G)

Appellants filed a Claim of Appeal as of right to the Michigan Court of Appeals on March 26, 2003. The Court of Appeals initially issued an Opinion for publication, dated May 11, 2004. (Attachment C) Appellants' Motion for Reconsideration of that May 11, 2004 Opinion was denied by an Order, dated June 28, 2004. (Attachment D) On the Court of Appeals' own Motion, the May 11, 2004 Opinion was vacated and a new amended Opinion for publication was rendered July 1, 2004. (Attachment A)

In that Opinion (Attachment A), the Court of Appeals affirmed in part, reversed in part and remanded to the Saginaw County Probate Court, stating:

> "After reviewing the record, we decide that the probate court erred in concluding that the VanConetts did not create a contract to make a will, and further decide that the beneficiaries of that contract had standing to bring an action to enforce it. The probate court did not err when it concluded that Herbert's will was revocable, however, the record is insufficient for us to determine whether Herbert revoke his will and whether that revocation breached the VanConetts' contract to make a will. Finally, we decide that the probate court did not err when it concluded that the estate did not have standing to bring a cause of action concerning the real property because the real property passed outside the VanConetts' wills. We affirm in part, reverse in part, and remand." (Attachment A, Page 1)

ISSUE I.

DID THE TRIAL COURT ERR IN FINDING DECEDENT'S WILL WAS REVOCABLE?

Appellants assert the answer is, "Yes."

Appellees assert the answer is, "No."

The Court of Appeals assert the answer is, "No."

The VanCONETT's had executed separate but mutual Wills on March 6, 1989. Each Will contained a reciprocal contract provision. Specifically, the Will of HERBERT L. VanCONETT contained the following provision:

> "I hereby expressly acknowledge that this Will is made pursuant to a contract or agreement entered into between my wife, ILA R. VanCONETT, and myself for the purpose of disposing of all our property, whether owned by us as joint tenants, as tenants in common or in severalty, in the manner hereinabove in this, my Last Will and Testament, provided, and **I expressly declare that in the event my wife, ILA R. VanCONETT, shall predecease me, then and in that event, this my Last Will and Testament shall be irrevocable**." (Emphasis Added) (Attachment H)

The Court found that HERBERT L. VanCONETT's Will was revocable. (Attachment E, Page 4) The Court based this finding on the conclusion that the lawyer who drafted the Wills and the secretary who typed the Wills, although both indicating the Wills were irrevocable, subsequently showed that intent was not present when they signed, prepared and notarized a subsequent Quit-Claim Deed involving the property after the death of ILA R. VanCONETT. (Attachment E, Page 4) The Court further found that the decedent, HERBERT L. VanCONETT had destroyed his Will by removing it from the Saginaw County Probate Court after the death of his wife. (Attachment E, Page 5) These findings are contrary to Michigan

law as applied to the facts of this case.

APPLICABLE LAW

> "Mutual wills are the separate wills of two or more persons which are reciprocal in their provisions, or wills executed in pursuance of a compact or agreement between two or more persons to dispose of their property, to each other or to third persons, in a particular mode or manner. . ." ***In re Thwaites Estate, 173 Mich App 697, 702; 434 NW 2d 214 (1988)***

> "The role of the Probate Judge is to ascertain and give effect to the intent of the Testator as derived from the language of the Will. . . . Absent an ambiguity, the Court is to glean the testator's intent from the four corners of the testamentary instrument." ***In re McPeak Estate, 210 Mich App 410, 412; 534 NW 2d 140 (1985)***

> "Parol evidence cannot be resorted to to add to, vary or contradict the language of a written instrument unambiguous on its face. . .The legal effect of a written instrument complete in itself and unambiguous in its terms, cannot be changed by parol evidence." ***Paul v. University Motor Sales Co, 283 Mich 587, 599; 278 NW 714 (1938)***

On the other hand, evidence is admissible as to a fact which does not tend to add to, contradict or vary the writing. ***Draper v. Village of Springwells, 235 Mich 168, 172-173; 209 NW 150 (1926); Dubay v. Kelly, 137 Mich 345, 348-349; 100 NW 677 (1904)***

> "Under the parol evidence rule, parties may introduce evidence not intended to contradict an integrated writing. 'Since the rule is supported by the public policy of preventing frauds and perjuries by limiting evidence of facts that contradict a valid contract, the rule does not apply to prevent proof' of one or more of the terms of the contract." ***In re Frost Estate, 130 Mich App 556 (footnote 1 on 563); 344 NW 2d 331 (1984)***

Extrinsic evidence is admissible to explain a matter to which a writing refers. ***Moore v. Mitchell 278 Mich 10, 18; 270 NW 197 (1936)***

Where a writing is ambiguous or incomplete, evidence is

admissible:

(a) as to a known custom or usage in order to clarify doubtful provisions of a contract; ***Saginaw Milling Co v. Schram, 186 Mich 52, 60; 152 NW 945 (1915)*** and

(b) to explain and clarify the meaning of words or phrases in order to determine the intent of the parties to a contract. ***In re Frost Estate, supra, at 564-565***

"A fundamental precept which governs the judicial review of wills is that the intent of the testator is to be carried out as nearly as possible. As with other legal documents, the "intent" is to be gleaned from the will itself unless an ambiguity is present. The law is loath to supplement the language of such documents with extrinsic information. This is especially so in the case of testamentary documents because the maker is not available to provide additional facts or insight.

However, presence of an ambiguity requires a court to look outside the four corners of a will in order to carry out the testator's intent. Accordingly, if a will evinces a patent or latent ambiguity, a court may establish intent by considering two outside sources: (1) surrounding circumstances, and (2) rules of construction. *In re Butterfield Estate,* 405 Mich. 702, 711, 275 N.W.2d 262 (1979).

A patent ambiguity exists if the uncertainty as to meaning "appears on the face of the instrument, and arises from the defective, obscure, or insensible language used". A latent ambiguity, on the other hand, arises "where the language employed is clear and intelligible and suggests but a single meaning, but some extrinsic fact or extraneous evidence creates" the possibility of more than one meaning." ***In re Kremlick Estate, 417 Mich 237, 240; 331 NW2d 228 (1983)***

ARGUMENT

Decedent's Will is clear and unambiguous. There is nothing ambiguous when decedent says in his Will:

> **"I expressly declare that in the event my wife, ILA R. VanCONETT, shall predecease, then and in that event, this my Last Will and Testament shall be irrevocable."** (Emphasis Added)

However, the Court resorts to and uses "extrinsic

evidence" in finding that the Will was revocable. Specifically, the Court says:

> "In this particular case, it is undisputed fact that **the lawyer** who drafted the Wills **and secretary** who typed or prepared the Wills, both indicating that they were irrevocable **subsequently showed that intent was not present. They both, the attorney and secretary, prepared, signed and notarized subsequent deeds involving this property after the death of Ila VanConett.**" (Emphasis Added) (Page 4 of Attachment E)

As it pertains to the issue of irrevocability, the extrinsic evidence regarding the execution of subsequent deeds is inadmissible and the inference drawn by the Court is not permitted.

The Court also disregarded and ignored the Affidavit of Lucy T. Belill wherein she indicated:

> "That on 11-8-96 and 11-18-96, after the death of ILA R. VanCONETT, HERBERT L. VanCONETT came into the office of F. H. MARTIN and wanted to change his Will. **He was advised by F. H. MARTIN that he could not change his Will as said Will was made pursuant to a contract with his wife, which became irrevocable upon the her death.**" (Emphasis Added) (Attachment O, Paragraph 6)

This testimony is admissible since it does not "contradict or add to the terms of an unambiguous document." ***Draper, supra***, at Page 172

Even assuming that this Court could properly draw an inference that the Will was revocable because the lawyer and secretary who typed the Will both prepared, signed and notarized the subsequent deeds involving the property, that inference or testimony does not overcome that which HERBERT L. VanCONETT and ILA R. VanCONETT expressly declare in their Wills. The Court's finding in this regard cannot be reconciled with the case of ***Foulks v. State Savings Bank, 362 Mich 13; 106 NW 2d 221 (1960).***

In ***Foulks, supra***, a husband and wife executed separate

but mutual Wills. Each Will was prepared and executed at the same time. Each Will contained the following clause:

> "'In consideration of the agreement between myself and my husband, John Foulks [the other instrument at this point reads 'my wife, Annie Foulks'] to each make a Will leaving all the property, real or personal, owned by us at the time of my death, to the survivor of ourselves for his or her lifetime, and the remainder to our son, Harold A. Foulks, Sr., I hereby give, devise and bequeath all interest I may have in any property, real or personal, or in any real property that may have been sold on land contract that may be owned by us at the time of my death unto my husband, John Foulks [the other instrument at this point reads 'my wife, Annie Foulks'], for his [her] lifetime.'" (at Page 14)

The wife died first. After her death, the husband executed a second Will disavowing the first Will. Plaintiff, the son and beneficiary under the first Will, filed suit to establish and enforce a mutual Will contract which contract he asserted was made for his benefit by the two first mentioned instruments. The Court framed the issue as follows:

> "'Do the instruments purporting to be the mutual wills of John and Annie Foulks, executed on September 6, 1952. incorporate a valid contract obligating the survivor to them to make a devise of their property owned by them at the death of one of them, to appellant?'" (at Page 14)

The Trial Court answered, "No", relying on the testimony of the attorney, Mr. Becker, who was the scrivener of both 9-6-52 Wills and who testified that it was his understanding that the instruments were not to be joint and mutual Wills. (at Page 15) In reversing the Trial Court's ruling, the Supreme Court, stated as follows:

> "**This testimony, assuming it was admissible** as tending to prove presence or absence of a testamentary contract between John and Annie, **does not overcome that which John and Annie declared in the simultaneously attested instruments**. The two instruments, examined together as they should be, disclose clear intent of John and Annie to contract in such manner as to make both instruments irrevocable from and after death of either. The quoted clause constitutes documentary evidence of such contract . . . and Mr. Becker's testimony does not qualify or destroy the evidentiary value thereof." (at Page 16) (Emphasis Added)

The Court of Appeals also found, "...the probate court did not err in finding the decedent's will was revocable." (Attachment A, Page 3) This was based on the Court of Appeals' ruling that:

> "When parties enter a contract to make a will, the contract, rather than the will itself, becomes irrevocable by the survivor after the death of a party. *Schondelmeyer, supra* at 570, quoting *Keasey v. Engles*, 259 Mich 178, syllabus; 242 NW 878 (1932). Thus, decedent had the right to revoke his will but he could not revoke the parties' contract. So, to the extent any subsequent wills contradicted the contract, plaintiffs have a right to seek specific performance of the agreement." (Attachment A, Page 3)

Interestingly, in ***Schondelmayer v. Schondelmayer, 320 Mich 565; 31 NW 2d 721 (1948)***, in the paragraph immediately following the Court of Appeal's referenced citation, the Court stated as follows:

> "And in Thompson on Wills, (3d Ed.), p. 238, § 153, the author states:
>
> > 'As a general rule, **a mutual** or joint **will may be revoked** by either of the comakers**, provided it was not made in pursuance of a contract. But where such will has been executed in pursuance of** a compact **or agreement** entered into by the testators to devise their separate property to certain designated beneficiaries, subject to a life estate or other interest in the survivor, **it is generally held irrevocable** when, upon the death of one, the survivor avails himself of the benefits of the devise in his favor.'" (at Page 570) (Emphasis Added)

The Court's reliance on *Schondelmayer, supra*, and *Keasey, supra*, is misplaced. In both of those cases, the spouses executed a **joint** mutual Will, and not **separate** mutual Wills as in the instant case. Further, in both those cases, the joint Will **did not** contain a provision making that joint Will irrevocable upon the death of the first spouse. The Court in both those cases found the "joint" Will valid and ruled that upon the death of the first spouse, the agreement underlying that joint Will

became irrevocable rather than the Will itself.

That is not the instant case. In this case, the separate but mutual Wills were made pursuant to a contract as clearly evidenced by the provision in decedent's Will which states:

> "I hereby expressly acknowledge that this Will is made pursuant to a contract or agreement into between my wife, ILA R. VanCONETT, and myself for the purpose of disposing of all of our property. . . in a manner hereinabove in this, my Last Will and Testament . . ." (Attachment H)

Further, decedent's Will specifically contained a provision making it irrevocable in the event his wife predeceased him as evidenced by the following Will provision:

> "I expressly declare that in the event my wife, ILA R. VanCONETT, shall predecease, then and in that event, this my Last Will and Testament shall be irrevocable." (Attachment H)

There is no dispute that ILA R. VanCONETT died before her husband. At that point, his Will became irrevocable. In this case, the question that begs for a rational answer is, *How can a testator revoke a Will which by its terms has become irrevocable?*

Under the facts of this case, both the Trial Court and Court of Appeals clearly erred in finding that the Will of HERBERT L. VanCONETT was revocable.

ISSUE II.

WHEN A HUSBAND AND WIFE EXECUTE SEPARATE BUT MUTUAL WILLS LEAVING PROPERTY FIRST TO THE SURVIVING SPOUSE AND UPON DEATH OF THE SURVIVOR, THE REMAINDER TO DESIGNATED BENEFICIARIES WITHOUT DEFINING THE SURVIVOR'S POWER OVER THE PROPERTY OR RESTRICTING THE DISPOSITION OF PROPERTY DURING THE LIFETIME OF THE SURVIVING SPOUSE, MAY THE SURVIVING SPOUSE DISPOSE OF THE PROPERTY BY GIFTING OR GIVING IT AWAY OR DISPOSING OF IT BY DEED OPERATING AS A TESTAMENTARY DISPOSITION AND/OR PLACING THE SAME IN NON-PROBATED ASSETS WITH PERSON OTHER THAN THE WILL CONTRACT BENEFICIARIES?

Appellants assert the answer is, "No."

Appellees assert the answer is, "Yes."

The Court of Appeals assert the answer is, "Yes."

HERBERT L. VanCONETT and his wife, ILA, executed separate but mutual Wills on March 6, 1989. (Attachments H and I) At the time of executing said Wills, the VanCONETT's were the owners of a home and real property they had acquired in June, 1956. (Attachment J) Each Will contained a reciprocal contract provision. Specifically, the Will of HERBERT L. VanCONETT contained the following provision:

> "I hereby expressly acknowledge that this Will is made pursuant to a contract or agreement entered into between my wife, ILA R. VanCONETT, and myself for the purpose of disposing of all our property, whether owned by us as joint tenants, as tenants in common or in severalty, in the manner hereinabove in this, my Last Will and Testament, provided, and I expressly declare that in the event my wife, ILA R. VanCONETT, shall predecease me, then and in that event, this my Last Will and Testament shall be irrevocable." (Attachment H)

ILA R. VanCONETT died July 18, 1993. (Attachment L) On May 31, 1996, HERBERT L. VanCONETT executed a Quit-Claim Deed conveying the fee title of the parties' marital home and real

property to his neighbor, Defendant, MARIANNE DURUSSELL, for $1.00 and reserved unto himself a life estate. (Attachment M)

The Court of Appeals in its Opinion, stated:

> "Plaintiffs next argue that the couple's contract provided that the surviving spouse would receive merely a life estate interest in the couple's real property at the first spouse's death, with the property passing in fee to the named beneficiaries when the surviving spouse died. Thus, plaintiffs argue, Herbert had no right to dispose of or transfer the couple's real property. Defendants counter that the contract and the wills did not contain this restriction, and assert that Herbert gained a fee interest in the property at Ila's death and the beneficiaries of Herbert's will were entitled merely to whatever remained in the estate at Herbert's death.
>
> Our reading of the Wills reveals that the couple's contract contained no language restricting the surviving spouse's interest in the property to a life estate, and therefore find defendants' argument persuasive. We note that plaintiffs' reliance on *Quarton v. Barton*, 249 Mich 474; 229 NW 465 (1930), is misplaced because the language of the will in that case expressly created a life estate interest in the surviving spouse and limited the surviving spouse's interest to a life estate. Unlike in *Quarton*, Herbert received a fee simple estate in the couple's property at Ila's death; hence, he was free to dispose of the property as he wished, and his beneficiaries were only entitled to the remainder." (Attachment A, Page 3)

The Court of Appeals misconstrued Plaintiffs' argument. Appellants relied on ***Quarton*** v. ***Barton, 249 Mich 474; 229 NW 465 (1930)***, for the proposition that under the facts of this case, the interest HERBERT VanCONETT received in the couple's property at his wife's death amounted to a life estate. At no time did Appellants argue that "Herbert had no right to dispose or transfer the couple's real property." Instead, as indicated on Page 4 of Appellants' Brief on Appeal, Appellants set forth their position on this issue as follows:

> "Upon the death of ILA R. VanCONETT, decedent became the sole surviving joint tenant of the subject property. Clearly, Mr. VanConett had the right during his lifetime to use the real property in question as he saw fit. This included the right to sell it and then use the proceeds for any purpose necessary for his support and comfort. However, he did not

have the right, as he did in this case, to give it away and dispose of it by deed operating as a testamentary disposition. To hold otherwise would nullify the purpose of executing joint reciprocal Wills and would render them worthless."

In asserting under the facts of this case, HERBERT VanCONETT's interest in the couple's property at his wife's death amounted to a life estate, Appellants relied on the cases of ***George v. Conklin, 358 Mich 301; 100 NW2d 293 (1960)*** and ***Quarton, supra***, which was cited therein. In ***George v. Conklin, supra***, the Court held that the phrase, "to be used or disposed of as the survivor may see fit" (Page 303) used in a joint Will amounted to "a life use with power of disposal during his or her lifetime." (Page 306) Specifically, in that case, a husband and wife had executed a document, 4-29-37, which they declared "to be jointly as well as severally, our Last Will and Testament." (Page 303) Item 3 of that instrument provided:

> "Item 3. The one of us surviving the other is to inherit all other property, real, personal or mixed, of the other or owned jointly by the parties hereto, to be used or disposed of as the survivor may see fit, and on the death of the survivor the property of both then remaining, except that mentioned in the foregoing paragraph, Item 2, shall be treated as one and the same, and be disposed of as hereinafter provided." (at Page 303)

The Court framed the issue before it as follows:

> "The basic question at issue is whether Mr. and Mrs. Conklin at the time they executed their joint will in 1937 bound themself by contract that the instrument, after the death of the party first passing, should become irrevocable by the survivor. . ." (at Page 306)

In answering "yes", the Supreme Court reasoned as follows:

> "In determining the question in the instant case we look primarily to the language of the instrument to ascertain therefrom, if possible, the intention of the parties. Particularly significant in such respect is the **language of item 3**, above quoted. Such language **indicates clearly that the survivor of the parties was to have the use of all property not specifically disposed of, with power to dispose thereof, subject to the provision**

that the property remaining on the death of the survivor should pass to the beneficiaries named. It thus appears that the survivor was to receive a life use with power of disposal during his or her lifetime. With the termination of such interest by death, the parties obviously intended the remainder of the property to go, in equal shares, and subject to the specific terms of the will, to the heirs of the parties. It is scarcely conceivable that either party, at the time the joint will was executed, contemplated that the survivor might defeat the expressed purpose of both parties as to the final disposition of their property." (Page 306) (Emphasis Added)

* * * * *

"In *Quarton v. Barton*, 249 Mich 474. . ., the language of the will construction of which was involved in the case gave to the wife of the testator both real and personal property for 'her lifetime to do with as she sees fit.' The testator further directed the disposition of his estate following the death of his wife. This Court rejected the claim that the widow took an estate in fee because of the power given to her, pointing out that the power of disposal does not in itself create an estate in property. The rule was further recognized that the intent of the testator should be determined from all the provisions of the will. Citing prior Michigan cases and also decisions from other States, it was held that the widow took a life estate only, with power to sell and dispose of the property, but. . .she could not 'give it away or dispose of it by will or by a deed operating as a testamentary disposition.' The Court also referred to the annotation in 2 ALR, pp 1243, 1319, 1320, where it was said:

'Where a will gives a life estate for the use and benefit of the life tenant, with a power of sale or disposition, and an express remainder over of 'what remains,' or some equivalent phrase, while the life tenant is entitled thereunder to the possession and control of the property during his life, with power to dispose of the whole or any part of the principal as his judgment dictate, he cannot dispose of the property by will or by a deed operating as a testamentary disposition.'

The language quoted is followed by the citation and discussion of a number of prior decisions, none of them, however, from Michigan. **We think the rule state in *Quarton v. Barton, supra,* may properly be applied in the instant case.**" (Emphasis Added) (Pages 309-310)

The issue isn't whether the surviving spouse has a life estate in the couple's real property upon the first spouse's death but rather, *What limitation, if any, is placed on the power of a surviving spouse during his/her lifetime over property which is subject to the parties' Will contract when the Will contract*

is silent on that issue? Specifically, may the surviving spouse without violating the Will contract:

(a) gift or give away said property?

(b) dispose of said property by deed operating as a testamentary disposition? and/or

(c) place said property in non-probated assets with persons other than the Will contract beneficiaries?

There is a paucity of Michigan law on this issue. Appellants' counsel is unaware of any Michigan case law that has addressed this specific factual scenario.

Michigan case law is clear that when a husband and wife have executed separate but mutual Wills pursuant to a contract, upon the death of the first spouse, the surviving spouse cannot revoke his/her Will and make a different disposition of his or her property. ***Smith v. Thompson, 250 Mich 302; 230 NW 156 (1930)*** As the Court said in ***Smith, supra***:

> "The contract was a mutual agreement on the part of both husband and wife that certain relatives of both should be provided for in their wills. Each of them had an interest in its performance as affecting those who were near and dear to them. The undertaking of each to perform was a sufficient consideration for the promise of the other. . . The breach of it by the one cannot but operate as a fraud upon the other. The husband continued to rely upon the contract, and at his death all of his property passed to his wife under his will. While by mutual consent the contract might have been abrogated during the lifetime of the husband, at his death it became an irrevocable obligation on the part of the wife." (at Page 305)
>
> * * * * *
>
> "'Where an agreement is entered into by two persons, and especially by husband and wife, to make mutual and reciprocal wills disposing of their separate estates pursuant to their mutual agreement, and where mutual and reciprocal wills are made in accordance with that agreement, and where, after the death of one of the agreeing parties, the other takes under the will and accepts the benefits of said agreement, equity will enforce specific performance of said oral agreement and prevent the perpetration of fraud which

would result from a breach of the agreement on the part of the one accepting the benefits thereof.'" (at Page 306)

* * * * *

"It has been repeatedly held by this court that in a suit in equity a person for whose benefit a promise is made may enforce it in his own name." (at Page 308)

However, that case does not address what a surviving spouse can do with that property during his/her lifetime when the Will provisions do not limit the surviving spouse's interest to a life estate.

Appellants assert it would be a reasonable extension/application of ***Smith v. Thompson, supra***, to say if a party during his lifetime cannot revoke his Will and make a different disposition of his property without violating the parties' contract, then that party during his lifetime should not be able to just give that property away, dispose of it by deed operating as a testamentary disposition, or place it in non-probated assets by joint and survivorship agreements without violating the parties' Will contract.

It is a basic precept of contract law that "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and in its enforcement." ***Flynn v. Korneffel, 451 Mich 186, 213, n 8; 547 NW2d 249 (1996) (Levin, J., dissenting); Stark v. Budwarker, Inc, 25 Mich 305, 313, n 7; 181 NW 2d 298 (1970)*** This "good faith and fair dealing" element of all contracts dictates that there be a restriction on a spouse's power to dispose of that property in a manner which neither defeats the purpose of the agreement nor is

inconsistent with the intent of the parties as evidenced in their separate mutual Wills. The Court's remarks in ***George***, ***supra***, that "It is scarcely conceivable that either party, at the time the joint will was executed, contemplated that the survivor might defeat the expressed purpose of both parties as to the final disposition of their property." (Page 306) is equally applicable to this case. This is especially true since it was the standard practice of the firm that prepared the parties' Will to explain the ramifications of that contractual provision in each of their Wills. The scrivener of the Wills, F. H. Martin, died 12-28-96. An Affidavit of Fred Martin, Jr., who practiced law with F. H. Martin was submitted wherein he indicated:

> "That it was the standard practice of our firm to explain the effect and ramifications of the above mentioned provision in their separate wills as follows:
>
> (a) That the will of each of them was being made pursuant to a contract or an agreement between them as husband and wife to devise all of their property in the manner and to the beneficiaries as designated in their respective will.
>
> (b) That during their lifetime, each had the right to amend, revise or revoke the provisions of their separate wills. However, if neither did so, upon the death of one them, the will of the surviving spouse would become irrevocable for the reason that their wills had been made pursuant to a contract between them.
>
> (c) That whatever property the surviving spouse still possessed at the time of his or her death would then be disposed of according to the terms of the will that of surviving spouse.
>
> (d) That "**all our property**" meant just that - all of their property, no matter how owned, i.e. separately or jointly.
>
> (e) **That during the lifetime of the surviving spouse, he or she could do with that property as he or she saw fit but the surviving spouse could not give away, gift or dispose of that property in a manner which**

would be inconsistent and thwart the intent of the parties as evidenced in their separate mutual wills.

(f) **Further, that if they did so, then the designated beneficiaries under that will would have a cause of action to enforce the terms of the contract because the surviving spouse breached the contract pursuant to which that will was made.**" (Emphasis Added) (Attachment Q, Paragraphs 2 and 9)

While no Michigan Court law appears to be directly on point, Appellants would refer this Court to decisions from other states which have addressed this same issue.

In ***Fitch v. Oesch, 30 Ohio Misc 15; 281 NE2d 206 (1971)***, a husband and wife executed a mutual Will agreement whereby all property went to the survivor and at the death of the survivor, one-half to the nieces and nephews of the husband and one-half to the nieces and nephews of the wife. The wife executed a Will in accordance with that agreement. The husband died first and the wife later made a Codicil to her Will in which she left a farm and residence in trust for one, Lawrence Oesch, and upon his death to his children. In addition, she turned all the bank accounts and insurance into non-probated assets by joint and survivorship agreements with not only the parties' nieces and nephews but other of her relatives. (at Page 208) The Court found that the agreement was enforceable by law (at Page 208) and further indicated:

> "It is also the court's interpretation, and the court finds that the survivor of the two of these parties, Lela Oesch, had a perfect right to spend and use up as much or all of the property as she desired because the first provision made in the will was to leave it to the surviving spouse." (Page 208)

The Court then framed the issue before it as follows:

". . .does this carry over to her right to give it away or place it in nonprobate assets out of the reach of the will and interpretation of the agreement."

The Court answered, "No," stating:

"An agreement of this sort is peculiarly subject to the protection of the court. One of the parties had died and therefore has no way to seek enforcement of the agreement. To say that she has a right, out of her property, in view of the agreement, to dispose of any property in any way except by the agreement, by joint and survivorship accounts or by free gift, and also in this case by codicil to her will, is to say that the agreement for all practical purposes is not to be enforced. It is a logical conclusion that anyone can for all practical purposes abrogate with impunity this agreement if they can make gifts of the property as they see fit or to place it in bonds or such so that the effect of the agreement becomes null and void. If such be the case, then these agreements are of no value and the agreement would be able to be abrogated with impunity by the survivor by use of the law on joint and survivor accounts or by gift to dispose of the property.

Therefore the court rules that the agreement is binding on Lela Oesch and she could neither by the contrivance of joint and survivor accounts, or bonds or by codicil to will, dispose of her property in any other way than under the agreement of December 27, 1963." (at Page 208)

* * * * *

". . .the agreement takes priority over any other disposition made during the lifetime of Lela Oesch, of any of her property, except that used for her own purposes and living. Thus the court rules that the property that she had at the date of the codicil and left to Wayne Oesch as Trustee for Lawrence Oesch, and any and all other property that she disposed of during her lifetime as gifts or through the means of joint and survivorship agreements, must be considered in full as part of the estate." (at Pages 208-209)

In ***Wagner v. Wagner, 58 App Div 2d 7; 395 NYS2d 641 (1977)***, a husband and wife executed a joint Will which provided in pertinent part as follows:

"We, Raymond M. Wagner, and Theresa B. Wagner, his wife, in consideration of the agreement of each of us to dispose of our property as hereinafter set forth, do hereby make, publish and declare this to be our joint Last Will and Testament. . .

First: We give to the survivor of us all our property, both real and personal. . .

Second: After the death of the survivor of either of us, all our property, both real and personal, we give devise and bequeath unto our children. . ." (at Page 642)

Theresa died 9-27-71. At the time of her death, Raymond and Theresa owned "*as tenants by the entirety*" two parcels of real estate and one bank account in their joint names. (at Page 642) Raymond subsequently sold one parcel of real estate. He later married Anne and used the proceeds from the sale of that one parcel to purchase real property which was referred to as the "Forest Green property", taking title therein in the names of Raymond and Anne as "*tenants by the entirety.*" Raymond died 11-7-74. At the time of his death, Raymond owned the "Forest Green property" as tenants by the entirety with Anne, his second wife, and also two bank accounts in his name jointly with Anne which had emanated from bank accounts which were Raymond and his first wife's, Theresa. (at Page 642) Plaintiffs, the children of Raymond and Theresa, commenced suit asserting that the joint Will executed by their parents imposed a constructive obligation upon the survivor to dispose of his or her assets, upon his or her death, to them. (at Page 642) The Trial Court dismissed the Complaint on the grounds that "joint will did not expressly impose a restriction on the disposition of property during the lifetime of the surviving spouse . . . and that the joint will may not be enforced as a contract, for want of adequate consideration." (at Page 642) In reversing the Trial Court, the appellate court stated as follows:

> "Two persons may validly agree to dispose of their estates in a particular way and may embody their agreement in mutual wills or a joint testament. . .
>
> A will is, of course, always ambulatory and revocable until death. . .[but]. . . one so inclined may bind himself by a mutual or joint will to dispose of his estate in a specified and agreed manner. . .Indeed, to permit the one who survives to gain the benefits of the joint will and then to flout its provisions in violation of the promise made

to the other 'would be a mockery of justice'. * * * The principle, supported by reason and equity, has been followed in this State * * * as well as in other jurisdictions. . .

Each [testator] was at liberty during his lifetime to use his own [property] as he saw fit, short of making a different testamentary disposition or a gift to defeat the purpose of the agreement, which was that upon his death each was to leave the property of which he was then possessed in the manner agreed upon. . ." (at Page 643)

* * * * *

". . .Raymond, of course, was free during his lifetime to use the property so received but he could not make a testamentary disposition contrary to the agreement or a gift, as he did here, to defeat the purpose of the agreement.

. . .There was consideration sufficient to enforce the agreement, found in the mutual promises of the testator/testatrix to have the survivor dispose of the property to their children upon his or her death." (at Pages 643-644)

In ***Ashley v. Volz, 218 Tenn 420; 404 SW2d 239 (1966)***, a husband and wife executed a joint Will that provided upon the death of either, all of their property would go to the survivor except for specified gifts and that upon the death of the survivor, the unexpended residue owned by the survivor would then go to their only son, if living, and if not, to his children. (at Page 240) The mother died first. The father remarried and then gave to his second wife the property that otherwise would have gone to his child or grandchildren. (at Pages 240-241) The Court in imposing a constructive trust upon the property for his grandchildren after the death of his son, quoted with approval the Rhode Island case of ***Daniels v. Aharonian, 63 RI 282; 7 A2d 767***:

"'Moreover, if that part of the agreement which binds the surviving party contains no provision defining such party's powers over the whole property during the survivorship, but only provides that he shall by will dispose of his property at his death to certain

beneficiaries a certain way, then it seems to be well settled that he holds all the property subject to a trust to carry out the agreement, but may use not only the income but reasonable portions of the principal for his support and for ordinary expenditures, and may change the form of it by reinvestment and the like, but must not give away any considerable portions of it or do anything else with it that would be inconsistent with the spirit or the obvious intent and purpose of the agreement. . ." (at Pages 243-244)

In ***In Re Estate of Bell, 6 Ill App 3d 802; 286 NE2d 589 (1972)***, a husband and wife each had a child prior to their marriage. They executed a joint Will in which each bequeathed to the other all real and personal property owned by either of them at the time of their death and upon the survivor's death, one-half to each of their children. The wife died first and the husband subsequently converted bank accounts to joint ownership between himself and his child. (at Page 590) After the husband's death, the wife's son filed suit to impose a constructive trust upon the joint bank accounts between the husband and his son. (at Page 590) The Court imposed such a trust finding a valid and enforceable contract existed by the unrevoked joint and mutual Will of the husband and wife. (at Page 590)

In Re Estate of Tompkins, 195 Kan 467; 407 P2d 545 (1965), involved a contractual Will of husband and wife which contained the following provision:

"'Second. All property, whether jointly or separately held and whether real or personal owned by either of us is hereby devised and bequeath to the survivor, with the right of disposal'. . .." (at Page 469)

The Court in that case held that the phrase "with the right of disposal" as used in the Will did not authorize the survivor to "give" property away.

In ***In Re Estate of Chayka, 47 Wis 2d 102; 176 NW2d 561 (1970)***, a husband and wife executed a joint Will giving the property to the survivor and providing that on the death of the survivor that the property would go to a named third person. The husband died first. The wife subsequently remarried and transferred to her second husband as gifts much of the real and personal property awarded her under the Will of her first husband. (at Page 562-563) The Court held that such transfers were a violation of the joint will agreement and stated:

> "This. . . appeal asks whether the survivor of the two contracting parties may give away the property received by her under the joint will, thus defeating the intent of the mutual agreement and joint will that such property of the survivor shall go to the person designated by the agreement. We answer that transfer by gifts inter vivos of a substantial portion of the property received under the joint will must be held to be violative of the agreement of the parties and as a matter of law not made in good faith." (at Page 563)

For all the reasons stated above, Appellants assert that the Court erred in finding that decedent had the right to convey to Defendant DURUSSEL the parties' marital home by Quit-Claim Deed for $1.00. Further, the Court erred in finding that decedent did not violate the parties' agreement by his acts in gifting and giving away to Defendant LEIDLEIN and placing in non-probated assets with Defendant LEIDLEIN other property of the parties.

ISSUE III.

DID THE COURT OF APPEALS ERR IN HOLDING THAT THE REAL PROPERTY IN QUESTION WAS NOT COVERED BY THE COUPLE'S WILL CONTRACT AND INSTEAD AUTOMATICALLY PASS TO THE HUSBAND OUTSIDE OF HIS WIFE'S WILL BY VIRTUE OF HIS SURVIVORSHIP RIGHTS OF THEIR JOINT TENANCY?

Appellants assert the answer is, "Yes."

Appellees assert the answer is, "No."

The Court of Appeals assert the answer is, "No."

The VanCONETT's had executed separate but mutual Wills on March 6, 1989. (Attachments H and I) At the time of executing said Wills, the VanCONETT's were the owners of a home and real property they had acquired in June, 1956, taking title as "Herbert L. VanConett, Ila R. VanConett and Florence H. VanConett, as joint tenants with full right of survivorship and not as tenants in common." (Attachment J) Florence H. VanConett died April 16, 1967. (Attachment K)

It was Appellants' position that the Wills of both HERBERT L. VanCONETT and ILA R. VanCONETT referenced a contract or agreement between themselves for the purpose of disposing all of their property which included this real estate. Specifically, the Will of ILA R. VanCONETT contained the following provision:

> "I hereby expressly acknowledge that this Will is made pursuant to **a contract** or agreement entered into between my husband, HERBERT L. VanCONETT, and myself **for the purpose of disposing of all our property, whether owned by us as joint tenants, as tenants in common or in severalty**, in the manner hereinabove in this, my Last Will and Testament, . . ." (Emphasis Added) (Attachment I)

The Will of HERBERT L. VanCONETT contained the following provision:

"I hereby expressly acknowledge that this Will is made pursuant to a contract or agreement entered into between my wife, ILA R. VanCONETT, and myself **for the purpose of disposing of all our property, whether owned by us as joint tenants, as tenants in common or in severalty**, in the manner hereinabove in this, my Last Will and Testament. . ." (Emphasis Added) (Attachment H)

The Court of Appeals, however, disagreed finding that the real property passed outside of Ila's Will and that it was not part of her estate and not covered by the couple's contract to make a Will. In this regard, the Court stated:

> "We disagree with plaintiffs' argument that the probate court erred in finding that the real property passed outside Ila's will. Property held as joint tenants with full rights of survivorship automatically passes to the surviving tenant(s) at a tenant's death. 1 Cameron, Michigan Real Property law (2d ed), § 9.11, pp 306-307. Because title passed instantly at Ila's death, it would not have been part of her estate and would not be covered by the couple's contract to make a will. Therefore, the estate has no right to seek its return. This is true even though the VanConetts' wills purported to apply to "all our property, whether owned by us as joint tenants, as tenants in common or in severalty." Certainly, the VanConetts could not destroy the survivorship right through their wills because a will has no effect until the testator's death. The VanConetts' contract to make a will did not expressly indicate that the couple wished to terminate their joint tenancy and destroy the survivorship rights attached to it. No authority suggests that merely expressing a desire to end a joint tenancy carries out the task of terminating a joint tenancy with rights or survivorship. Therefore, we conclude that the VanConetts' wills did not terminate the survivorship rights of their joint tenancy. The property passed to Herbert immediately at Ila's death and the estate lacked standing to seek its return to the estate." (Attachment A, Pages 4-5)

Appellants would assert that such a ruling is

(a) contrary to Michigan law,

(b) contrary to the express intent of the parties as expressed in their respective Wills, and

(c) makes null, void and of no value separate and/or joint mutual Wills as it applies to property a husband and wife hold jointly with right of survivorship.

CONTRARY TO MICHIGAN LAW

The Court of Appeals ruling that real property, the title of which a couple holds jointly with survivorship rights is not covered by their mutual Will contract is contrary to ***Schondelmayer***, ***supra***. In that case, the joint mutual Will of the parties provided that the ownership to all of their property first go to the surviving spouse and upon the survivor's death, then to their three sons. (Page 568) The title to the real property which the three sons were to receive was held by the parties *"jointly in entireties"*.(Page 568) In that case, the Court ruled the property was subject to the parties' contract. (Page 575)

Similarly, such a holding is contrary to ***Carmichael v. Carmichael, 72 Mich 76; 40 NW 173 (1888)***. In that case, a husband and wife executed separate Wills at the same time. At that time, the husband was the titleholder of 60 acres of land and his wife was the titleholder of 40 acres of land. (Page 80) The husband's Will devised to his wife the 60 acres of land during her lifetime. Upon her death, their son, Charles, would get 10 acres and the remaining 50 acres divided equally among two other sons and a daughter. The wife's Will devised to her husband her 40 acres during his lifetime. Upon his death, the land was to be divided equally among the above mentioned two sons and a daughter.

The husband died 6-28-1884. Up to that time, neither

of their Wills had been revoked or altered. Subsequently on 8-18-1884, the wife conveyed by Warranty Deed her 40 acres to two of her other children, Hattie and Charles. That same day, Hattie and Charles then deeded one-third of the same to Charles' son - all of whom were Defendants in this matter. The Complainants in this matter were the two sons and the daughter who were the beneficiaries of the 50 acres under the husband's Will and 40 acres under the wife's Will. The Complainant sought to have the deed set aside. (Page 82) In that case, the Court ruled that the property was subject to the parties' contract and set aside the deeds. (Pages 85-86)

CONTRARY TO PARTIES EXPRESS INTENT

In Michigan, there are only three ways title to real property can be held, i.e. in severalty, in joint tenancy, or in common. MCL 554.43 specifically provides as follows:

> "**Estates**, in respect to the number and connection of their owners, **are divided into estates in severalty, in joint tenancy, and in common**; the nature and properties of which, respectively, shall continue to be such as are now established by law, except so far as the same may be modified by the provisions of this chapter." (Emphasis Added)

The provision in each of the parties' Will describes what property is included in "all our property" and includes all three methods of holding title. Specifically, the language in each Will states, "all our property, whether owned by us as joint tenants, as tenants in common or in severalty..." Clearly, the parties' agreement encompasses this real estate.

The Court of Appeal's ruling totally disregards what

has long been Michigan law and that is, "...it is entirely competent for a person to make a valid agreement binding himself to make a particular disposition of his property by last will and testament." ***Bird v. Johnson, 73 Mich 483, 492; 41 NW 514 (1889)*** In this case, the parties by contract bound each other to a certain disposition of "**all our** property, whether **owned by us as joint tenants**, as tenants in common or in severalty". (Emphasis added)

The intent of the parties is clear. Their Will contract applies to **all** of their property and specifically includes property "**owned by us as joint tenants**". At the time the parties executed their separate mutual Wills, they owned the subject marital realty as "joint tenants". (Attachment J) For the Court to say this marital home/realty is not covered by the parties' contract is to totally disregard the express language of the parties' mutual Wills and clear expression of their intent.

RENDERS MUTUAL WILLS WORTHLESS

Practically all real property a husband and wife own together is titled jointly with right of survivorship. In Michigan, a husband and wife usually take title as "husband and wife, tenants by the entirety." If a deed to a husband and wife is silent as to how title is held, then Michigan law says they hold it as "tenants by the entirety. In ***Hoyt v. Winstanley, 221 Mich 515; 191 NW 213 (1922),*** it is stated,

"... **a conveyance to husband and wife conveys an estate in entirety**, but may create

one in joint tenancy or in common, if explicitly so stated in the deed. . ." (Page 518) (Emphasis Added)

Also, Michigan Land Title Standards (5th ed), Standard 6.5 provides:

"CREATION OF TENANCY BY ENTIRETIES

A deed or devise to two persons, who are in fact husband and wife, creates a tenancy by the entireties, unless a contrary intent is expressed in the deed or devise. . ." (Emphasis Added)

". . . an estate by the entirety is a species of joint tenancy and is commonly included in that class. . . **an estate by the entirety is a joint tenancy**." ***Hoyt***, ***supra***, at 518 (Emphasis Added) Further, an incident of "an estate by the entireties" is the right of survivorship. ***Lilly v. Schmock, 297 Mich 513, 517; 298 NW 116 (1941)***

Applying the above noted basic real estate law to the facts of this case, it is clear that the Court of Appeals decision effectively renders mutual Wills worthless in covering or applying to real estate owned by a husband and wife.

As a practical matter, and in most cases, the assets of husband and wife - be it real estate or personalty - are held jointly with right of survivorship. As such, upon the death of the first spouse to a mutual Will, that spouse's Will is never probated because there are no assets to probate. Title to the property would have gone to the surviving spouse outside of the Will by virtue of the jointly held assets. It is precisely for this reason that parties enter into mutual Wills and make them irrevocable upon the death of the first spouse.

Once the parties' assets are vested solely in the surviving spouse, the importance of the parties' contract regarding the eventual disposition of all the parties' assets becomes apparent. The parties' agreement reflects their joint desires and wishes regarding the ultimate disposition of that solely held property and it is why people enter into mutual Wills.

For the Court to say that the real estate passed outside of probate by virtue of the joint tenancy created and was not covered by the couple's Will contract is to nullify, void and make a mutual Will worthless and of no value.

Appellants do not dispute that jointly held property passes to the surviving joint tenant outside the Will and nothing needs to be probated. Once, however, Ila died, then the title to that property vested solely in HERBERT and became subject to the provisions of **his** Will dealing with the disposition of their **joint** and, now, his **severalty** property.

It was and is Plaintiffs' position that HERBERT did not have a right to dispose of that property in a manner inconsistent with and in violation of the parties' contract. As such, the Personal Representative of HERBERT's Estate had the right to seek its return since it was in violation of the parties' contract.

For the reasons stated above, Appellants assert that the Court erred in ruling that the real estate in question passed outside of probate by virtue of the joint tenancy created and was not covered by the parties' Will contract.

RELIEF

Plaintiffs-Appellants respectfully request this Court to grant its Application for Leave to Appeal. Alternatively, Plaintiffs-Appellants request this Court to:

A. Summarily reverse the Probate Court's Order, dated February 25, 2003, granting summary disposition in favor of Defendant, MARIANNE DURUSSEL, and remand this matter to the Saginaw County Probate Court for entry of an Order Granting Plaintiffs' Summary Disposition on their Complaint against Defendant, MARIANNE DURUSSEL.

B. Summarily reverse the Probate Court's Order, dated March 24, 2003, granting summary disposition in favor of Defendant, ELIZABETH LEIDLEIN.

Dated this 5th day of August, A.D., 2004.

Respectfully Submitted,

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